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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

BORRETTE LANE ESTATES, LLC, a California General Partnership Plaintiff and Respondent, v. RICHARD E. WARREN, JR., Defendant and Appellant.	A117459 (Napa County Super. Ct. No. 26-30065)

INTRODUCTION

Defendant Richard E. Warren, Jr. appeals in propria persona from the judgment of the Napa County Superior Court in favor of plaintiff and respondent Borrette Lane Estates, LLC, declaring that the option agreement that was the subject of litigation was valid and binding on interveners John and Katherine Ford (the Fords), appellant Warren, and appellant's successors in interest. Appellant contends the court erred in ruling: (1) that appellant and the Fords were collaterally estopped from challenging the validity of the option by a settlement agreement and a previous adjudication of the option's validity in a bankruptcy proceeding by appellant's predecessor in interest; (2) that the option did not constitute an unreasonable restraint on alienation in violation of public policy; (3) that the option did not violate the Subdivision Map Act (Gov. Code, § 411 et seq.); and (4) that appellant was not a bona fide purchaser as he had notice, both

constructive and actual, of the option. Appellant further contends the court erroneously limited his cross-examination of intervener John Ford on the issue of valuation of the property burdened by the option.

This timely appeal followed.[1] We shall affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND[2]

In April 1994, K&L Enterprises (K&L), the predecessor in interest of respondent, sold the five-acre subject real property located at 1030 Borrette Lane in Napa, California to William H. Noyes III and Pamela Ney-Noyes (the Noyeses) for a negotiated purchase price of $674,000. K& L retained a 50-year option to purchase the northerly 3.7 acres of the property, subject to various conditions and restrictions.[3] The option agreement stated that it "shall inure to the benefit of and shall be binding upon any successors in interest" of the parties and that it was "assignable by [the] Optionee." The option recited that $10 was given as good and valuable consideration for the option. Also, the purchase price negotiated between the Noyeses and K&L took into account only the value of the 1.3 southerly acres of the property, including a newly constructed home. An abstract of the option was recorded against the property on May 3, 1994. (Appellant concedes the recording of the abstract provided constructive notice of the option.)

In March 1997, the Noyeses sued K&L and others in the Napa County Superior Court for damages, alleging, among other things, various defects in the home located on

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[1] The Fords have not appealed the decision of the trial court.

[2] Appellant's opening brief contains very few citations to the record before us—virtually none in his factual statement, in violation of the appellate rules. (Cal. Rules of Court, rule 8.204(a)(1)(C); see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶¶ 9:132, 9:36, pp. 9-38, 9-11to 9-12 (Eisenberg).) This would be an independent ground for affirming the judgment. (Eisenberg, at ¶ 9:36, pp. 9-11 to 9-12.) Nevertheless, we exercise our discretion to base our decision on the merits. (*Ibid.*)

[3] Among other things, the exercise of the option was conditioned upon prior approval and filing of a final subdivision map or parcel map as required by the Government Code or a successor statute. It further provided that during the term of the agreement, the Optionor (the Noyeses) would make no improvements to the option property without the consent of the Optionee (K&L).

the property, negligence in construction, concealment of material facts in the sale of the property, damages to personal property, and emotional distress. The Noyeses filed a second, separate action in the Napa County Superior Court against K&L and others, alleging physical personal injuries and other damages allegedly occurring as a result of defects in the construction of the house. During the course of that litigation, the Noyeses claimed the option was not valid.

On October 19, 1998, the Noyeses settled all of their claims pursuant to a written settlement agreement. Under the settlement agreement, the Noyeses received a sum of money in excess of $600,000 in exchange for, among other things, a full and complete release of all claims that they had, or may have had, against K&L and other defendants in the action and an express waiver of the provisions of section 1542 of the Civil Code. The settlement agreement also stated in paragraph 8: "The obligations of the Noyes Parties, and each of them, pursuant to the Option Agreement shall remain in full force and effect. . . ." (See also Settlement Agreement, *Recitals*, ¶ D ["The obligations of the Noyes Parties pursuant to the Promissory Note and the Option Agreement shall continue in full force and effect, except as expressly modified by this Settlement Agreement"].) A copy of the option agreement was attached as an exhibit to the settlement agreement.

As additional compensation for the Noyeses' agreement that the option would remain in full force and effect, K&L agreed to further restrict development on approximately 0.3 acres of the property subject to the option. The settlement agreement expressly provided that it was made for the benefit of and to be binding upon, the successors and assigns of each party thereto.

After executing the settlement agreement, K&L assigned all of its assets, including the option, to respondent.

In 1999, the Noyeses filed for bankruptcy and, among other things, sought to avoid the provisions of the settlement agreement relating to the option. They instituted an adversary proceeding in the United States Bankruptcy Court for the Northern District of California against respondent, K&L, and others, alleging, among other things, that the option was void due to an alleged violation of Rule 3-300 of the Rules of Professional

Conduct of the State Bar of California (Rule 3-300) by Logan, the attorney who drafted the option. Respondent moved for summary judgment against the Noyeses. In their opposition to the summary judgment motion, the Noyeses argued that the option was invalid and unenforceable, that it might constitute a restraint on alienation, and that the option contemplated an illegal subdivision. On July 28, 2000, the bankruptcy court issued its memorandum of decision granting summary judgment. The Noyeses moved for reconsideration, which the bankruptcy court denied, stating that the court, "fundamentally disagrees with [the Noyeses'] legal position . . . that they were entitled to sandbag defendants in prior litigation by taking defendants' money while entering into a settlement agreement which was not binding and enforceable. The settlement involved no waiver of constitutional rights, and [the Noyeses] were fully represented by counsel. Accordingly, their motion for reconsideration of the order dismissing this case with prejudice is denied."

The Noyeses appealed to the United States District Court for the Northern District of California. On February 22, 2001, that court affirmed the bankruptcy court's decision. The Noyeses argued, among other things, that the option had been rendered ineffective due to Logan's alleged violation of his ethical obligation. The court rejected that argument, on the ground that "when the Noyeses entered into the Settlement Agreement, the option agreement and second deed of trust were not unenforceable; the Noyeses merely had a claim that these agreements were unenforceable. *In the Settlement Agreement, the Noyeses agreed to give up all claims against Defendants, even those that they were not aware of at the time.* This leads to the inescapable conclusion that the Noyeses agreed to release the claim to litigate whether Logan violated Rule 3-300 and thus, whether the second deed of trust and option agreement were unenforceable." (Italics added.) The court concluded "that by entering into the Settlement Agreement, *the Noyeses released all claims against Defendants*, including their claims that Logan violated Rule 3-300 and that the option agreement and second deed of trust are unenforceable." (Italics added, fn. omitted.)

In November 2000, the Noyeses transferred the property to MFG, Inc., an entity with which intervener John Ford was affiliated. Ford knew of the option and settlement agreement before title was transferred to MFG. The Fords conveyed title to the property to appellant in October 2002. Ford testified in the trial below that he was certain he had disclosed the existence of the option and the settlement agreement to appellant before transferring the title.

In April 2005, appellant's counsel wrote to respondent, contending the option was invalid and of no force and effect. Based thereon, respondent filed the underlying declaratory relief action. In response, appellant argued that the settlement agreement was unenforceable, that the option violated the rule prohibiting unreasonable restraints upon alienation, that the option violated Government Code section 66499.30, subdivision (b) of the Subdivision Map Act, and that the option was unenforceable as an unreasonable restraint upon alienation.

The Fords intervened in the action, on the basis that they had an action pending in the superior court against appellant in which the Fords had asserted, among other things, that they had an ownership interest in the subject property. They also contended that the option was invalid.

Following a court trial in October 2006, the court issued a statement of decision in favor of respondent. The court found that the validity of the option had previously been agreed upon in the settlement agreement and adjudicated in the bankruptcy proceeding and on appeal therefrom. Consequently, appellant was collaterally estopped from rearguing the validity of the option. Alternatively, the trial court also found respondent was entitled to declaratory relief, even if appellant were not bound by collateral estoppel. Specifically, the court found in pertinent part: the option was supported by valuable consideration, as the purchase price for the entire five-acre parcel was discounted because of the burden of the option; the option did not constitute an unreasonable restraint on alienation and did not violate public policy, as it had been sold at least twice since the original purchase for increasing sums, both the Fords and appellant had found it attractive notwithstanding the burden of the option, and many homes in Napa County were located

on five-acre parcels upon which development was restricted; and appellant Warren was not a bona fide purchaser for value without notice, as he had both actual and constructive notice of the option when he purchased the property. The court further found appellant had not presented persuasive authority that the option violated the Subdivision Map Act or that the sale from K&L to the Noyeses was a sale for which a parcel map was required.

Judgment was entered on February 2, 2007. This timely appeal followed.

DISCUSSION

I. *Collateral Estoppel*

Appellant contends the court erred in concluding that appellant was collaterally estopped by the bankruptcy court decision from relitigating the validity of the option. We disagree.

"When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." (Rest.2d Judgment, § 27, p. 250.) " 'Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, "precludes relitigation of issues argued and decided in prior proceedings." [Citation.]' [Citation.]." (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82.)

" 'Collateral estoppel is an equitable concept based on fundamental principles of fairness.' [Citation.] 'Issue preclusion prevents "relitigation of issues argued and decided in prior proceedings." [Citation.] The threshold requirements for issue preclusion are: (1) the issue is identical to that decided in the former proceeding, (2) the issue was actually litigated in the former proceeding, (3) the issue was necessarily decided in the former proceeding, (4) the decision in the former proceeding is final and on the merits, and (5) preclusion is sought against a person who was a party or in privity with a party to the former proceeding. [Citation.]' [Citation.]" (*Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 398-399; see also *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341-343 (*Lucido*).)

"Collateral estoppel (like the narrower 'claim preclusion' aspect of res judicata) is intended to preserve the integrity of the judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation. (*Lucido, supra,* 51 Cal.3d 335, 343.)" (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829.)

We review the trial court's determination as to the applicability of collateral estoppel de novo. (*Murphy v. Murphy, supra,* 164 Cal.App.4th at p. 399.)

A. Privity

Appellant first argues that he was not in "privity" with the Noyeses, so cannot be bound by their settlement or the bankruptcy action. We disagree.

"The concept of privity for the purposes of res judicata or collateral estoppel refers 'to a mutual or *successive relationship to the same rights of property*, or to such an identification of interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify application of the doctrine of collateral estoppel. [Citations.]' [Citations.]" (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1069-1070, italics added.)

Appellant focuses upon the expanded concept of privity to argue that his relationship was not sufficiently close with the Noyeses to require that he be bound by their settlement agreement or the judgment in the bankruptcy action. He fails to acknowledge that the expansion of the concept does not eviscerate the traditional view, but expands the boundaries of privity to relationships that were formerly beyond its reach. The expansion has been recognized by our Supreme Court in *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, which expressly states that the traditional concept of privity as referring to acquisition of an interest in the subject matter of the litigation after judgment through inheritance, *succession* or *purchase*, "*has also been expanded* to refer to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the

unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel [citations]." (*Id.* at p. 875, italics added.)

The expansion of the concept of privity does not supplant the traditional roots of the doctrine. As the language italicized above demonstrates, under the older, narrower definition, privity is established by the successive relationship to the same property rights through the transfers of title from the Noyeses to MFG, Inc. and the Fords, and from the Fords to appellant. Appellant here, as a subsequent purchaser and successive owner of the property, is asserting the same rights the Noyeses had before they transferred the property.

Under the expanded definition of privity, due process requires that the nonparty have had an identity or community of interest with and adequate representation by the party in the previous action. We have no difficulty here holding there was both an identity of interest between appellant and the Noyeses in the first action and adequate representation by the Noyeses of their successors in interest to the property, including the burden of the option.

We conclude that, whether under either the traditional or the expanded concepts of privity, appellant and the Noyeses were in privity for all purposes relating to ownership of the subject property and the validity of the option.

B. Validity of the option was actually litigated and necessarily determined by the bankruptcy court and the federal district court

Appellant argues that collateral estoppel does not apply because on the Noyeses' appeal from the bankruptcy court's ruling, the federal district court did not determine the validity of the option against the challenges that it was a restraint on alienation in violation of public policy and that it was an unlawful attempt to circumvent provisions of the Subdivision Map Act. (Gov. Code, § 66499.30, subd. (b).) Appellant relies upon *Newport Beach County Club, Inc. v. Founding Members of the Newport Beach Country Club* (2006) 140 Cal.App.4th 1120 (*Newport Beach*).

In *Newport Beach*, an unincorporated association composed of founders of the country club had previously brought an action to enforce a right of first offer contained in

the county club's governing documents. The country club moved for summary judgment on two separate and independent grounds: (1) that no member organization existed on the date of the proposed sale of stock at issue, and (2) that the proposed stock sale did not trigger the right of first offer, even if there were a proper member organization in existence. (*Newport Beach, supra*, 140 Cal.App.4th at p. 1124.) The trial court granted summary judgment on both grounds, but the appellate court affirmed only on the first ground, expressly declining to reach the second ground. (*Ibid.*) Thereafter, the association registered itself as a member organization entitled to exercise the right of first offer. The country club filed a declaratory relief action and the trial court granted summary judgment in the club's favor on the ground that the members were collaterally estopped by the decision in the previous litigation from arguing that the right of first offer had been triggered. On appeal, the appellate court held the issue of whether the right of first offer had been triggered by the stock sale proposal could be relitigated as the appellate court had not based its affirmance on that ground, concluding "that when a trial court judgment decides a case on two alternate grounds, and the appellate court affirms based on one ground, the judgment is binding under principles of res judicata and collateral estoppel only on the ground addressed by the appellate court." (*Id.* at p. 1123.)[4]

[4] "As the *Newport Beach* court explained, the traditional rule provides that a general affirmance of a judgment on appeal renders it res judicata as to all issues, claims or controversies encompassed in the action and passed on by the lower court, even though the reviewing court does not consider or decide upon all of them. (*Newport Beach, supra*, 140 Cal.App.4th at p. 1126.) This rule finds its source in the early California law opinion in *People v. Skidmore* (1865) 27 Cal. 287. The modern rule, embedded in the Restatement Second of Judgments, section 27, comment *o*, provides that where the reviewing court upholds one of the determinations but refuses to consider whether the others are sufficient and accordingly affirms the judgment, that judgment is conclusive as to the first determination. (*Ibid*.) Notwithstanding that *Skidmore* has not been expressly overruled, the *Newport Beach* court declined to follow it, reasoning that '[t]he traditional rule is inconsistent with an appellate court's duty under the California Constitution, article VI, section 14 to set forth its decisions in writing "with reasons stated." Giving conclusive effect to both of two alternate grounds for a judgment, when the Court of Appeal expressly declines to address one ground, undermines the credibility and accuracy of the decision.' (*Newport Beach, supra*, 140 Cal.App.4th at p. 1132.) As

We believe *Newport Beach* is distinguishable. We do not here face the circumstance of a trial court determination based on multiple, independently adequate bases and an appellate court affirming that decision on only one of the alternative bases.

Here, it is clear that the "issue" before the bankruptcy court and the district court on appeal was the Noyeses' claim that the option was invalid, despite the settlement agreement. The question on summary judgment was whether there existed a triable issue of material fact as to the validity of the option or whether execution of the settlement agreement and resulting dismissal of their state court action precluded the Noyeses' action. On appeal from the bankruptcy court's grant of summary judgment against the Noyeses, the district court held the Noyeses' claims against respondent and others were barred by their execution of the general release and the dismissal with prejudice of the state court lawsuits and that the barred claims included the alleged failure of the attorney who drafted the option to comply with the state bar court rule relating to conflicts of interest.

Appellant asserts that the "issue" addressed by the district court on appeal was whether the conflict of interest of counsel could suffice to void the settlement agreement, as well as the option, and that the appellate court did not address the other grounds upon which he asserts the option was void—i.e., that the option was an invalid restraint on alienation and that it violated the Subdivision Map Act. Appellant does not recognize the distinction between the "issue" heard and determined in a former case and the legal theories or arguments made or that could be made by the parties with respect to the issue. (See 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 419, pp. 1064-1065.)

"Issue preclusion bars relitigation of any issue which was actually litigated in the prior proceeding. [Citation.] For purposes of issue preclusion, however, an 'issue' includes any legal theory or factual matter which could have been asserted in support of or in opposition to the issue which was litigated. (*Sutphin v. Speik* (1940) 15 Cal.2d 195,

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well, modern case law has effectively dissipated the strength and viability of *Skidmore*. (*Newport Beach*, *supra*, at p. 1131.)" (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1574-1575.)

202.)" (*Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1565-1566 (*Border Business Park*).) "Despite the established principle that collateral estoppel results only as to issues actually litigated [citation], it is often said that a judgment is binding as to all matters that were raised or that might have been raised. [Citation.] Is this latter statement incorrect as applied to subsequent suits on a different cause of action? The conflict appears to be largely one of expression, which may be resolved if 'issues' is given a reasonable meaning. Clearly, a former judgment is not a collateral estoppel on issues that might have been raised but were not; just as clearly, it is a collateral estoppel on issues that were raised, *even though some factual matters or legal arguments that could have been presented were not*. [Citations.]" (7 Witkin, Cal. Procedure, *supra*, Judgment, §419, pp.1064-1065, italics added, citing Rest.2d Judgments, § 27, Comment e, among others; accord, e.g., *Murphy v. Murphy*, *supra*, 164 Cal.App.4th at p. 401; *Border Business Park,* at pp. 1565-1566.)

Appellant here seems to contend that " 'an issue heard and determined in a former case is binding only as to such grounds supporting or opposing said issue as were actually urged and litigated. But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result.' [*Price v. Sixth Dist. Agricultural Assn.* (1927) 201 Cal. 502,] 511.)" (7 Witkin, Cal. Procedure, *supra,* Judgment, § 419, p. 1065.)

Furthermore, even the *legal theories* upon which appellant seeks to base his assertion that the option was invalid and the settlement agreement ineffective as to those claims—i.e., that the option was void as a restraint on alienation and a violation of the Subdivision Map Act—were *raised* by the Noyeses in the bankruptcy court action. The district court affirmed the summary judgment in its entirety, necessarily rejecting those legal theories and arguments. The decision of the district court in the appeal was focused on the main legal theory apparently raised by the Noyeses on appeal, that of attorney Logan's misconduct in connection with the option. Nevertheless, the district court expressly and necessarily determined that the settlement agreement precluded the

Noyeses from claiming the option was void. Other *legal arguments* as to reasons the option might be void were necessarily also precluded. To conclude otherwise would encourage numerous, successive challenges to the validity of the option by owners of the property on as many different legal theories as they and able counsel could devise.

We conclude the court did not err in determining that collateral estoppel applied to the instant action by appellant.

II. *Substantial Evidence*

As a separate and independent basis for our decision, we conclude that substantial evidence supports the trial court's determination that the option was valid and binding on appellant and his successors in interest, even in the absence of collateral estoppel.

A. Notice

Appellant contends the weight of the evidence does not support the trial court's determination that he was not a good faith purchaser for value without notice of the option. He misunderstands the standard of review here. As an appellate court, we do not reweigh the evidence. Rather, we apply the substantial evidence standard of review to the court's determination of any disputed question of fact. So long as there is "substantial evidence" supporting the court's determination, we must affirm. (Eisenberg, *supra*, ¶¶ 8:39, 8:43, pp. 8-18 to 8-19, 8-20 to 8-21.) " '[T]he power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . .' [Citations.]" (*Id.*, at ¶ 8:39, p. 8-19.) The testimony of a single credible witness—even if a party to the action—will constitute substantial evidence. (*Id.*, at ¶ 8:52, p. 8-23.) Moreover, we defer to the trier of fact on the assessment of witness credibility. (*Id.*, at ¶ 8:41, p. 8-19.)

Appellant acknowledges he had constructive knowledge of the option via the recorded abstract of judgment. Such constructive notice suffices to prevent him from claiming that he is a bona fide purchaser without notice. **(***McLane v. Van Eaton* (1943) 60 Cal.App.2d 612, 615; see Civ. Code, §§ 1213-1215.)

Moreover, the court determined that appellant had actual knowledge of the option. Appellant's contention that the preponderance of the evidence supported his testimony that Ford did not tell him of the option is meritless, given the substantial evidence standard of review under which we operate.

B. No restraint on alienation

Substantial evidence supports the trial court's determination that the option does not constitute an unreasonable restraint on alienation. As recently observed in *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356 (*Alfaro*), a case upholding a deed restriction that required low income housing properties to remain affordable to buyers with very low to moderate income (*id.* at pp. 1363-1364): "Civil Code section 711 provides, 'Conditions restraining alienation, when repugnant to the interest created, are void.' *City of Oceanside v. McKenna* (1989) 215 Cal.App.3d 1420 (*McKenna*) explained, ' " 'The day has long since passed when the rule in California was that all restraints on alienation were unlawful under the statute; it is now the settled law in this jurisdiction that only unreasonable restraints on alienation are invalid.' [Citation.]" ' (*Id*. at p. 1427, quoting *Martin v. Villa Roma, Inc.* (1982) 131 Cal.App.3d 632, 635, quoting *Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 682.) [¶] 'In determining whether a restraint on alienation is unreasonable, the court must balance the justification for the restriction against the quantum of the restraint. The greater the restraint, the stronger the justification must be to support it.' (*McKenna*, *supra*, 215 Cal.App.3d at p. 1427.)" (*Alfaro*, at p. 1376.)

As Miller and Starr observe, "[t]o determine which restraints are reasonable and which are unreasonable, it is necessary to balance the interests of the parties as a question of fact." (3 Miller & Starr, Cal. Real Estate (3d ed. 2009) § 9:38, p. 58, fn. omitted.) Here, the trial court found the five-acre parcel burdened by the option had been sold at least twice since the original purchase for increasing sums, both the Fords and appellant found it attractive notwithstanding the burden of the option, and many homes in Napa County were located on five-acre parcels upon which development was restricted. Substantial evidence in the record supports these findings, including evidence that in

2000, MFG, Inc./John Ford purchased the property from the Noyeses for $850,000, and in October 2002, appellant purchased the property from Ford for $2.6 million. Appellant testified he had difficulty selling the property because of the complexity of the option's terms. However, he cites no authority that an option to purchase real property that makes it difficult to sell constitutes an unreasonable restraint on alienation.

C. Subdivision Map Act

The trial court found that appellant failed to show the option violated the Subdivision Map Act (Gov. Code, § 66499.30, subd. (b).) We agree.

Government Code section 66499.30, subdivision (b) provides: "No person shall sell, lease or finance any parcel or parcels of real property or commence construction of any building for sale, lease or financing thereon, except for model homes, or allow occupancy thereof, for which a parcel map is required by this division or local ordinance, until the parcel map thereof in full compliance with this division and any local ordinance has been filed for record by the recorder of the county in which any portion of the subdivision is located." Subdivision (e) of that section specifically provides that an offer or contract to sell real property or to construct improvements thereon is not prohibited under the Subdivision Map Act, if the offer or contract "is expressly conditioned upon the approval and filing of a final subdivision map or parcel map, as required under this division."[5] The option itself provides in relevant part in paragraph 3 that: "The exercise of the option by Optionee is expressly conditioned upon the prior approval and filing of a final subdivision map or parcel map as required by Title, Division 2 of the California Government Code or a successor statute. . . ."

This provision appears to bring the option within the provisions of subdivision (e) of Government Code section 66499.30, and appellant has failed to show that the option, nevertheless, violates subdivision (b) of that section.

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[5] "Nothing contained in subdivisions (a) and (b) shall be deemed to prohibit an offer or contract to sell, lease, or finance real property or to construct improvements thereon where the sale, lease, or financing, or the commencement of construction, is expressly conditioned upon the approval and filing of a final subdivision map or parcel map, as required under this division." (Gov. Code, § 66499.30, subd. (e).)

Appellant argues that because the real estate purchase contract that is attached as an exhibit to the option agreement does not include the identical provision, the option is an unconditional agreement to sell the option property, despite the option's express terms. This makes no sense and none of the cases that appellant has cited stands for this proposition. Rather, it is a long established maxim of law, recognized by appellant, that "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) Moreover, "[i]n the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Code Civ. Proc., § 1858.)

"The most fundamental rule of appellate review is that an appealed judgment or order is *presumed to be correct.* 'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' [Citations.]" (Eisenberg, *supra,* ¶ 8:15, p. 8-5, quoting *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

The trial court properly concluded that appellant had failed to show the option violated the Subdivison Map Act.

D. Limitation of cross-examination

Appellant contends that the trial court abused its discretion and committed reversible error in limiting cross-examination of intervener Ford regarding the details of the price paid by Ford in 2000, and by appellant in 2002, and "possible differences in value" to rebut Ford's testimony that he told appellant about the option when he sold the property to appellant. He argues that respondent would not have been prejudiced had the court permitted appellant's attorney "some latitude to pursue the line of questioning of [Ford] on matters of valuation" of the property. (We note that the question of admissibility does not turn on whether *respondent* would have been prejudiced by a contrary ruling.)

We review challenges to the trial court's exclusion or admission of evidence under the abuse of discretion standard of review. (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476; Eisenberg, *supra*, ¶ 8:96.1, pp. 8-48 to 8-49.)

The pages of the record to which appellant cites do not indicate, as appellant claims, that the court "sustained Respondent's repeated relevance objections, and refused to allow Appellant to pursue a line of questioning that might effectively impeach or rebut Ford's . . . claim that he had informed Appellant verbally prior to close of escrow as to the existence of the Option."

Appellant cites to pages 37 and 38 of volume five of the reporter's transcript as the place where the court abused its discretion in limiting appellant's cross-examination of Ford. Ford was asked whether appellant paid for the property, and testified on cross-examination that appellant gave "two invalid, unenforceable promissory notes" as consideration for the deed. Counsel for interveners (the Fords) objected on the ground that the answer "invaded the providence of the other lawsuit." Appellant's counsel argued that "it goes to the issue of whether or not Mr. Warren, who is acting as a fiduciary in one circumstance when he was a loan broker, and as a buyer in the other situation, whether what he did during those transactions, and I'm trying to lay a foundation and get in evidence to make the argument that, indeed, it was, it was almost unthinkable that a person in his position would act as fiduciary, get a loan with time, one, without examining these documents, and number two, purchase the property without examining these documents." The court agreed with intervener's counsel that appellant "can make that argument later." Appellant's counsel responded, "That's fine."

Appellant does not explain how the refusal to allow Ford to testify as to the unenforceability of the promissory notes given by appellant was relevant to impeach Ford's testimony that he told appellant of the option, or how appellant was prejudiced by the sustaining of the specific objection.

Thereafter, Ford testified that appellant did not pay $2.6 million dollars for the property, testifying that "we received something like $10,000. And two unenforceable

notes. We tried to collect on the notes. And he said, I don't owe you anything." The testimony continued:

"Q: Isn't it true, sir, that the total amount of consideration that Mr. Warren committed himself to for the purchase of 1030 Borrette lane in 2002, was approximately 2.6 million dollars?

"A: No, it's not.

"Q: What does that have to do with the option?

"[Counsel for interveners]: What—objection, Your Honor.

"THE COURT: Sustained.

"[Counsel for respondent]: We will accept, Your Honor, to extent that we have a unclean hands defense, and we're starting to catch glimpses of what appears to be predatory lending, I think this does effect [*sic*] any equitable basis upon which to view Mr. Warren's claims or defenses in this case.

"THE COURT: Something about what a tangled web we weave enters my thinking, but I don't know who, if anybody, is first starting out to deceive here. At this point probably nobody, but that remains to be seen. Well, I think I'm still going to sustain the objection and try to keep a lid on this bottle. [¶] And if I have to let the genie out at some point, I'll revisit the issue, but I thought this was going to be a nice clean case involving a legal determination as to whether Mr. Logan's imaginative structuring of the transaction to protect his rights as a seller, to develop the property if, and when, it ever became legally plausible to subdivide it would fly or not, and whether it would be binding on the defendants here either based on recorded notice or actual knowledge or constructive notice. [¶] But it looks like the case is not quite that simple, but I'm going to sustain the objection."

Appellant has failed to explain how the court erred in sustaining the objection. Indeed, it appears that *appellant's* own attorney also may have questioned the relevancy of Ford's answer when counsel asked in response, "What does that have to do with the option?" Respondent's attorney's comments appear to favor allowing further examination of Ford along the lines of Warren's failure to pay the full purchase price.

Thereafter, appellant's attorney elicited from Ford that the option significantly diminished the value of the property to the Noyeses and to any subsequent purchaser. In any event, the court found that the property was sold to Warren for $2.6 million in 2002—the point that his counsel appeared to be trying to make in his cross-examination of Ford.

In his reply brief, appellant contends the court abused its discretion in "excluding relevant and credible *documentary* evidence that would have tended to show that [the] negotiated purchase price paid by [appellant] in 2002 for his purchase of the Subject Property, was based on the valuation of the entire 5-acre parcel, not just the 1.3 acres that the house was constructed on." (Italics added.) However, the reply brief contains no record cites relating to this claim and appellant never identifies any "documentary evidence" that the court excluded. Appellant has thus waived any claim of error relating to an exclusion of any documentary evidence. (Eisenberg, *supra*, ¶ 9:36, p. 9-12, citing *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246, among others.)

In sum, appellant has failed to show either that the court abused its discretion in sustaining objections to Ford's testimony or that any error in limiting Ford's testimony prejudiced appellant.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on this appeal.

_____
Kline, P.J.

We concur:

_____
Lambden, J.

_____
Richman, J.